Office Supreme Court U. S.
FILED
JAN 16 1899
JAMES H. McKENNEY
Clerk

No. . October Term, 1898.

Brief of Dale & Dickson for Pet.

Filed Jan. 16, 1899.

IN THE

Supreme Court of the United States.

EX PARTE JOHN ROEHM.

Petition for Writ of *Certiorari* requiring the Circuit Court of Appeals for the Third Circuit to certify to the Supreme Court for its revision and determination the Writ of Error taken by John Roehm, a citizen of the State of Pennsylvania, against Paul R. G. Horst, a citizen of the State of New York, E. Clemens Horst, a citizen of the State of California, and Louis A. Horst, a citizen of the State of Illinois, late trading under the firm of Horst Brothers.

R. O. MOON,
RICHARD C. DALE,
SAMUEL DICKSON,
For the Petitioner.

Allen, Lane & Scott, Prs, Phila.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of John Roehm, a citizen of the State of Pennsylvania, respectfully represents as follows:—

First.—Your petitioner is a citizen of the State of Pennsylvania.

Second.—An action was brought against your petitioner by the firm of Horst Brothers in the Circuit Court of the United States for the Eastern District of Pennsylvania, at Philadelphia, upon an alleged breach of contracts for the purchase and sale of hops. The case was heard under a stipulation waiving a jury, before the Hon. George M.

Dallas, Circuit Judge, who made a special finding of facts, which is found at page 20 of the record here filed, and upon the facts so found, gave judgment against your petitioner for the sum of $10,118.30. From this judgment a writ of error was taken to the United States Circuit Court of Appeals for the Third Circuit.

Third.—The case having been heard before Acheson, Circuit Judge, and Butler and Kirkpatrick, District Judges, the opinion of the court was delivered on December 16th, 1898, by Kirkpatrick, J., affirming the judgment of the lower court. (Record, page 109.)

Fourth.—Upon August 25th, 1893, the firm of Horst Brothers and your petitioner entered into four written contracts, two for the purchase and sale of Pacific Coast hops of the crop of 1896, and two for the purchase and sale of Pacific Coast hops of the crop of 1897. The following is a copy of one of the said contracts:—

"MEMORANDUM OF AGREEMENT made and entered into by and between *Horst Brothers*, doing business in the City of New York, parties of the first part, and *John Rochm*, parties of the second part, *Witnesses:*

"That the said parties of the first part agree to sell and deliver to the parties of the second part, and that parties of the second part agree to purchase, pay for and receive from the party of the first part one hundred (100) bales prime Pacific Coast hops of the crop of 1896. Three and one-half pounds tare to be deducted on each bale. Said hops to be delivered *ex* dock or store New York City, and to be paid for in net cash ten days from date of arrival at the rate of twenty-two (22) cents per pound. Time of shipment, 20 bales each month October, November, December, January, February, except as hereafter provided.

"If at any time a difference of opinion shall exist regarding the quality or condition of any hops submitted or tendered under this agreement, each party shall select an arbitrator, to whom the question of quality and condition

shall be submitted, and in case of their disagreement, a third arbitrator shall be selected by the two thus chosen and the decision of a majority of the three shall be final; and in case the decision shall be that the hops tendered are not equal to the quality above called for, the parties of the first part shall, within 30 days after receipt of written notice of such decision, submit samples or tender delivery to the parties of the second part, other hops, in fulfillment of this agreement, and parties of the second part agree to receive same.

"*In witness whereof* the said parties have hereunto set their hands, Philadelphia, this 25th day of August, 1893.

"HORST BROTHERS. (L. A. H.)
"JOHN ROEHM."

The others are identical in form except as to the time of shipment. Subsequently to the date of the said contracts, the firm of Horst Brothers was dissolved, and the retiring partner assigned to his copartners all his interest in the said contracts with your petitioner.

On June 27th, 1896, your petitioner wrote to the firm of Horst Brothers the following letter:—

"PHILADELPHIA, June 27, 1896.

"*Messrs. Horst Bros., 42 Pearl Street, New York City.*

"DEAR SIR:—Yours of the 23d inst. notifying me of the dissolution of the partnership of Horst Bros. is received. I suppose that your reason for giving me the notice is on account of the contracts which I had with your late firm, for the furnishing to me of 200 bales of prime Pacific Coast hops of the crop of 1896, and 200 bales of prime Pacific Coast hops of the crop of 1897, which, of course, you cannot fulfill. I therefore consider the contracts as annulled and will make other arrangements for the purchase of the hops that I may need, and you may consider this as release from liability on your part, to comply with the contracts.

"Yours truly,

"JOHN ROEHM."

In October, 1896, the plaintiff made the first shipment of twenty bales of hops required under the above contracts, and sent to your petitioner the invoice and bill of lading covering the same. On October 24th, 1896, your petitioner sent the following telegram and letter:—

"PHILADELPHIA, PA., October 24th, 1896.

"*Horst Brothers, San Francisco.*

"I decline to receive shipment of hops October ninth. Particulars by mail.

"JOHN ROEHM."

"PHILADELPHIA, October 24, 1896.

"*Messrs. Horst Brothers, No. 220 California St., San Francisco, California.*

"GENTLEMEN:—Yours of October 9th enclosing bill of lading and bill of particulars for 20 bales of hops, forwarded me under the terms of contract of August 25th, 1893, was received and I have wired you that I decline to receive the same.

"I notified you under date of June 27th, 1896, that owing to the dissolution of the copartnership with which I originally contracted, and the fact that this firm was no longer in existence, I considered my contract at an end and will make arrangements for purchasing my supplies elsewhere.

"I am advised that I am under no obligation by that contract to accept supplies from you.

"If you desire to bill these goods at the current market rates *under a new contract*, I will accept them, if upon inspection they are of the quality desired, otherwise they will remain at the freight station subject to your order.

"Very truly yours,

"JOHN ROEHM."

At the time of your petitioner's refusal to receive the shipment above mentioned, the trial judge found that the plaintiffs could have made subcontracts for forward delivery according to the contracts in suit, at the price of

nine cents per pound for prime Pacific Coast hops of the crop of 1896, and eleven cents per pound for like hops of the crop of 1897, and the difference between the price fixed by the contracts sued on, and those above mentioned, together with interest, amounted to $10,118.30, for which he ordered that judgment be entered as of the date of January 27th, 1898.

Fifth.—Your petitioner further shows that suit was brought upon January 23d, 1897, at which time the only hops deliverable under the contract were those under the first contract for one hundred bales, to be shipped at the rate of twenty bales per month, in the months of October, November, December, 1896, and January, 1897, and that at the time of the trial upon December 13th, 1897, the only hops deliverable were those covered by the first two contracts for hops of the crop of 1896, and the hops shipped under the third contract during the months of October and November, and possibly the month of December, for the crop of 1897, and that the deliveries of shipments made during the months of February, March, April, May, June, and July, 1898, were not deliverable at the time of the entry of judgment, upon January 27th, 1898.

Sixth.—Your petitioner further shows that upon the trial in the court below it was contended, on behalf of your petitioner, that the plaintiffs were not entitled to sue in October, 1896, for a breach of contracts which by their terms, did not mature until after suit brought, and that the measure of damage was the difference between the market and contract price at the time when deliveries should have been made and accepted. Both these contentions were overruled, and the plaintiffs were allowed to recover for the difference between the price at which forward contracts could have been obtained, and the contract price for all the deliveries under all the contracts.

Seventh.—Your petitioner further shows that the right to sue for an anticipatory breach of contract before the

time of performance has arrived, commonly spoken of as the rule in Hochster *vs.* de la Tour, has never been affirmed by your Honorable Court. On the contrary, when the question was brought before this court, in the case of Dingley *vs.* Oler, 117 U. S., 572, Mr. Justice Matthews, delivering the opinion of the court, referred to the rule as a novel doctrine, which had been disputed and denied by the Supreme Judicial Court of Massachusetts, and never applied by this court, and he added: "The construction we placed upon what passed between the parties renders it unnecessary for us to discuss or decide whether the doctrine of these authorities can be maintained as applicable to the class of cases to which the present belongs."

Eighth.—Your petitioner further shows that the rule is one of very constant application, and although it is conceded that it has been very generally followed in the courts of this country and of England it is unquestionably true that the rule was not universally recognized as an innovation in the law of contracts at the time it was established, and that it was first applied in the case of a contract of service, and for a breach of a promise to marry, upon the ground that cases of that character were *sui generis*, and clearly distinguishable from the breach of ordinary contracts. Notwithstanding this, it has since been followed in all classes of contracts, but without any serious discussion of the principle upon which so important an exception is to be rested, and it would be in the highest degree interesting and instructive to the profession, throughout the entire country, if this court would now take up and deal with and finally dispose of this important question.

As a necessary sequence to the rule, it became necessary to introduce a further innovation in regard to the measure of damages. It has been universally held that the basis upon which damages are to be allowed, in an action for the breach of contract, is that of compensation, but as allowed in the present case, the plaintiffs were not only compensated but rewarded for the anticipatory breach, and the learned judge, in delivering the opinion of the

Court of Appeals, justifies the assessment of damages upon the ground that the defendant was a wrongdoer who was properly punished for his breach of contract. If the plaintiffs had, in point of fact, purchased the very forward contracts, which they offered testimony to prove that they could have secured, and had made deliveries thereunder in accordance with the terms of the contracts, they would not have received their intermediate profit until the maturity of each separate contract; but the learned court, instead of discounting the aggregate of these sums, so as to ascertain their cash value at the date of judgment, actually allowed interest from the time of the original renunciation.

Wherefore your petitioner prays that a writ of *certiorari* may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the case therein entitled John Roehm, plaintiff in error, *vs.* Paul R. G. Horst, E. Clemens Horst, and Louis A. Horst, late trading under the firm of Horst Brothers, defendants in error, No. , to the end that the said case may be reviewed and determined by this court, as provided by law, and that the judgment of the said Circuit Court of Appeals in the said case may be reversed by this Honorable Court.

And your petitioner will ever pray.

BRIEF OF ARGUMENT.

FIRST.

Of the Anticipatory Breach.

The principal question, of the right to maintain an action for a breach of contract before the time fixed for its per-

formance, is one of constantly recurring importance, and it is believed that the distinct refusal of this court, in Dingley *vs.* Oler, to affirm the rule first invented in Hochster *vs.* De la Tour, will excuse and justify this application.

In the Circuit Court his Honor Judge Dallas thus disposed of the question (pages 25, 26 of Record):—

"This case is within the rule laid down in Hochster *vs.* De la Tour, 2 El. & Bl., 678, and the other English cases cited in Dingley *vs.* Oler, 117 U. S., 502. In the case last mentioned the Supreme Court, after remarking that the rule referred to had been followed by the courts of several of the States, but had been denied by the Supreme Judicial Court of Massachusetts, declined to decide whether or not it should be maintained 'as applicable to the class of cases' to which the one then before it belonged. The facts of that case were somewhat peculiar, and it is not quite clear that the court's declination to pass upon the applicability of the doctrine of Hochster *vs.* De la Tour to it implied a doubt as to the propriety of its application in a case so plainly within that doctrine as is that now presented. But, assuming the broad question to have been left open by the Supreme Court, I think that upon the preponderance of authority, as well as upon sound reasoning, it must be held that a right of action had accrued to the plaintiffs, with respect to all the contracts in question, at the time this suit was brought. There can be no doubt that this would be so under the law of England, and a diversity in the law, as administered on the two sides of the Atlantic, concerning the consequence to result from an absolute repudiation by one party of a commercial contract of this kind, is greatly to be deprecated. Norrington *vs.* Wright, 115 U. S., 206.

"In my opinion, the argument of the court in Daniels *vs.* Newton, 114 Mass., 530, was well and sufficiently answered in Dingley *vs.* Oler (11 Fed., 372). What is there said need not be repeated at length, but I may remark that I concur with the learned judge in thinking that the several State decisions cited by him (to which others might be added) as in conflict with Daniels *vs.* Newton, are 'founded in good sense and rest on strong grounds of convenience, however difficult it may be to reconcile them with the strictest logic.'

"Since the decision of Dingley *vs.* Oler, the Circuit Court of Appeals for the Sixth Circuit has, in two cases (in both of which Dingley *vs.* Oler was cited) stated the law to be that—

"Where a contracting party gives notice of his intention not to comply with the obligation of his contract, the other party may accept this as an anticipatory breach of the contract, and sue for damages without waiting until the time mentioned for the completion and fulfillment of the contract by its terms. * * * Brewing Co. *vs.* Bullock, 59 Fed., 87; Lumber Co. *vs.* Alley, 43 U. S. App.,

175. In the absence of any controlling solution of the question by the Supreme Court, I do not hesitate to adopt this statement, supported, as it is, by the judgment of Judge Lowell in Dingely *vs.* Oler, as well as by the English authorities and by the judgments of the courts of several of the States."

In the opinion of the Court of Appeals, delivered by his Honor Judge Kirkpatrick, it is said:—

"Under these circumstances, the plaintiffs were justified in accepting these declarations as an anticipatory breach of the unperformed provisions of the contract, and were not obliged to make further tenders nor wait until the expiration of the time for making the latest deliveries under it before bringing their suit. While the Supreme Court of the United States in Dingley *vs.* Oler, 117 U. S., 490, declined to affirm the doctrine of Hochster *vs.* De la Tour, 2 Ell. & Bl., 673, the general consensus of opinion of courts of concurrent authority is in accordance therewith. In the recent case of Marks *vs.* Van Eegan, 85 Fed. Rep., 853, Wallace, C. J., after a careful review of all the authorities, in delivering the opinion of the Circuit Court of Appeals for the Second Circuit, says: 'In view of the overwhelming preponderance of adjudication, we think it must be accepted as the settled law that where one party to an executory contract renounces it without cause, before the time for performing it has elapsed, he authorizes the other party to treat it as terminated, without prejudice to a right of action for damages, and if the latter elects to treat the contract as terminated, his right of action accrued at once.' That the right to begin an action carries with it the right to obtain judgment, needs no argument."

It would seem, therefore, that the question was treated as one controlled by the weight of authority, but it cannot be considered as settled in this country until finally disposed of by the Supreme Court of the United States.

In Dingley *vs.* Oler, 117 U. S., 572 (brief, page 14), the English cases are referred to by Mr. Justice Matthews as follows:—

"The view taken by the Circuit Court of the correspondence and conduct of the parties, and which we hold to be erroneous, brought the case within the rule laid down by the English courts in Hochster *vs.* De la Tour, 2 El. & Bl., 678; Frost *vs.* Knight, L. R., 7, Ex. 111; Danube & Black Sea Railway Co. *vs.* Xenos, 11 C. B. N. S., 152, and which in Roper *vs.* Johnson, L. R., 8, C. P., 167, 178, was called a novel doctrine, followed by the courts of several of the States; Crabtree *vs.* Messersmith, 19 Iowa, 179; Holloway *vs.* Griffith, 32 Iowa,

409; Fox *vs.* Kitton, 19 Ill., 519; Chamber of Commerce *vs.* Sollitt, 43 Ill., 519; Dugan *vs.* Anderson, 36 Maryland, 567; Burtis *vs.* Thompson, 42 N. Y., 246, but disputed and denied by the Supreme Judicial Court of Massachusetts in Daniels *vs.* Newton, 114 Mass., 530, and never applied by this court. Accordingly the right to maintain the present action was justified upon the principle supposed to be established by those cases.

"The construction we place upon what passed between the parties renders it unnecessary for us to discuss or decide whether the doctrine of these authorities can be maintained as applicable to the class of cases to which the present belongs; for, upon that construction, this case does not come within the operation of the rule invoked.

"In Smoot's Case, 15 Wall., 36, this court quoted with approval the qualifications stated by Benjamin on Sales, 1st ed., 424; 2d ed., section 568, that 'a mere assertion that the party will be unable, or will refuse to perform his contract, is not sufficient: it must be a distinct and unequivocal absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made: for, if he afterwards continue to urge or demand a compliance with the contract, it is plain that he does not understand it to be at an end.'

"We do not find any such refusal to have been given or acted upon in the present case, and the facts are not stronger than those in Avery *vs.* Bowden, 5 El. & Bl., 714; S. C., 6 El. & Bl., 953, which were held not to constitute a breach or renunciation of the contract. The most recent English case on the subject is that of Johnstone *vs.* Milling, in the Court of Appeal, 16 Q. B. D., 460, decided in January of the present year, which holds that the words or conduct relied on as a breach of the contract by anticipation must amount to a total refusal to perform it, and that that does not, by itself, amount to a breach of the contract unless so acted upon and adopted by the other party."

Dingley *vs.* Oler, 117 U. S., 490, 502.

In Clark *vs.* National Benefit & Casualty Co., 67 Fed. Rep., 222, Judge Priest said:—

"The plaintiff then invokes the much-contested rule that where one of the parties to a contract of an executory character, before the time for performance, renounces it, or places himself in an attitude of impossibility of performance, the other may treat such action as a breach and sue at once as for a breach of the entire contract, although the time when he might require performance had not yet arrived. This view rests upon the reasoning and precedent of the case of Hochster *vs.* De la Tour, 3 El. & Bl., 678, and has never been approved or followed by the Supreme Court of the United States. All the intimations of that court are in opposition to such a rule.

"Thus in Smoot's Case, 15 Wall., 36-46, Mr. Justice Miller, speaking for the court, said:—

"'As between individuals, the impossibility which releases a man from the obligation to perform his contract must be a real impossibility, and not a mere inconvenience. And, while such an impossibility may release the party from liability to suit for non-performance, it does not stand for performance, so as to enable the party to sue and recover as if he had performed.'

"In the subsequent case of Dingley *vs.* Oler, 117 U. S., 490. 6 Sup. Ct., 850, the disposition of the court, though not deciding the question, appears to be strongly in sympathy with the views of the Supreme Court of Massachusetts, so ably expressed in Daniels *vs.* Newton, 114 Mass., 530, upon a careful consideration of the more prominent of the preceding cases. The views of the Massachusetts court in the case *supra* appear to me to be more consonant with reason and the spirit of the law, and would in this case preclude any recovery by the plaintiff, upon the idea of a recovery as for a breach of the entire contract."

Clark *vs.* National Benefit & Casualty Co., 67 Fed. Rep., 222, 225.

On the other hand, it must be conceded that the State and Federal Courts have generally followed Hochster *vs.* De la Tour, and the cases are collated in the opinion of the Circuit Court of Appeals, Second Circuit, delivered by Judge Wallace, in the recent case of Marks *vs.* Vaneeghen, 85 Fed. Rep., 853.

It is believed that a careful examination of the two principal cases in which the rule was first invented will show that they were decided upon their own particular facts, and do not furnish a precedent for a controversy like the present.

Hochster *vs.* De la Tour, 2 Ell. & Bl., 678, was the case of a courier. The contract was one for hiring for three months from June 1st, 1852, and on May 11th, 1852, the defendant wrote and declined the services of the plaintiff, who began his action May 22d, 1852. On the argument of the rule to enter a nonsuit or arrest of judgment, the plaintiff's counsel correctly said that the question was "whether it is possible to break a contract before the day for its performance comes."

It must be conceded that the weight of authority down

to that time was against the contention. The statement of the law by Baron Parke* in Phillpotts *vs.* Evans, 5 M. & W., 475, is conclusive as to what the law had been theretofore. That was a contract for the delivery of wheat, and the buyer gave notice that he would not accept. It was held that the measure of damages was the difference between the contract price and the market price on the day of tender, and not on the day of receiving notice. Mr. Baron Parke said (page 477):—

"If Mr. Richards could have established that the plaintiffs, after the notice given to them, could have maintained the action without waiting for the time when the wheat was to be delivered, then perhaps the proper measure of damage would be according to the price at the time of the notice. *But I think no action would then have lain for the breach of the contract, but that the plaintiffs were bound to wait until the time arrived for the delivery of the wheat, to see whether the defendant would then receive it. The defendant might then have chosen to take it, and would have been guilty of no breach of contract; for all that he stipulates for is, that he will be ready and willing to receive the goods, and pay for them, at the time when by the contract he ought to do so. His contract was not broken by his previous declaration that he would not accept them; it was a mere nullity, and it was perfectly in his power to accept them nevertheless; and,* vice versa, *the plaintiffs could not sue him before.* The same rule was adopted in the case of Startup *vs.* Cortazzi, 2 C. M. & R., 165. The notice amounts to nothing until the time when the buyer ought to receive the goods, unless the seller acts on it in the meantime and rescinds the contract. I think, therefore, that the damages have been calculated according to the proper principle, and that there should be no rule."

The opinion of the court in Hochster *vs.* De la Tour was delivered by Lord Campbell, and the true *ratio decidendi* is to be found at pages 69, 70, as follows:—

"If the plaintiff has no remedy for breach of the contract unless he treats the contract as in force, and acts upon it down to the 1st June, 1852, it follows that, till then, he must enter into no employment which will interfere with his promise 'to start with the defendant on such travels on the day and year,' and that he must then be properly equipped in all respects as a courier for a three months' tour on the continent of Europe. But it is surely much more rational, and more for the benefit of both parties, that after the renunciation of the agree-

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* "Probably the most acute and accomplished lawyer this country ever saw."—Lord Blackburn, L. R., 7 C. P., 554.

ment by the defendant the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it. Thus, instead of remaining idle and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract."

In other words, it would be extremely hard upon the plaintiff, and really prejudicial to the defendant, that the action should not be brought in advance of the time of performance, as otherwise the servant would be obliged to remain in idleness in order to prove his readiness to perform, and no possible wrong could be done to the defendant except that if the time of service under the contract had not expired before suit brought, the plaintiff might recover full damages, and afterwards secure employment from another master. Whether the reason given be good or bad, the rule there established was a perfectly plain case of judge-made law.

The question was incidentally considered and the doctrine recognized in the case of the Danube and Black Sea Company *vs.* Xenos, 11 C. B. N. S., 103, E. C. L., 152, though the refusal was continued and the suit was not brought till after the date of the performance; but there was no discussion of the subject in the opinion, either in the Court of Common Pleas or in the Exchequer Chamber.

The question next arose in Frost *vs.* Knight, which came before the Court of Exchequer upon a rule for a new trial, in L. R., 5 Ex., 322. That was an action for breach of promise to marry on the death of the defendant's father, who was still alive at the time of trial. In the Exchequer, Chief Baron Kelly delivered an opinion which was certainly not answered by Chief Justice Cockburn, but which has been comparatively lost sight of. He prefaces his argument as follows:—

"Nothing can be more certain, as a matter of fact, than that a promise to marry upon an event which has not yet happened is not broken by the defendant declaring that he will not perform his promise. If it can be called a breach at all, it is a promissory or prospective breach only; a possible breach, which may never occur, and not an actual breach. * * * To say that the contract is broken is simply to utter

an untruth. One contracts in 1870 to pay to another £1000 on the 1st January, 1871. To say that the contract is broken before the year 1870 is at an end is undeniably and self-evidently untrue. It seems equally clear and uncontrovertible in fact that a promise by a man to marry a woman after his father's death is not and cannot be broken while his father is yet alive. Yet these decisions have now made it law that a promise to do an act at a future day, or upon an event which has not yet occurred, is broken by a declaration to the promisee that it will be broken or will not be performed. And we are bound by these decisions, one of them having been pronounced in the Exchequer Chamber. It is necessary, therefore, to consider whether their authority extends not only to the contracts to which they related, and others of the like nature, but to a contract of a totally different character and peculiar to itself, like a contract to marry."

He next discusses the cases to which Lord Campbell had referred, and concludes that—

"The judgment as delivered by Lord Campbell will be found, when carefully considered, to amount to no more than an argument upon the reasonableness of affording some remedy to the plaintiff, where, by reason of the declaration of the defendant that he would not take him into his service when the 1st of June should arrive, he was obliged either to remain unemployed until the 1st of June and lose the opportunity of obtaining another engagement, or to accept any other engagement that might be offered to him, and so disentitle himself to maintain an action, on the ground that he could not aver that he was ready and willing to perform his part of the agreement."

He then proceeds to show that Hochster *vs.* De la Tour was "not only unsupported by any previous authority, but directly opposed to the principle of several cases to which it is now necessary to advert."

In the Exchequer Chamber, L. R., 7 Ex., 111, the opinion was delivered by Chief Justice Cockburn, who thus explains Hochster *vs.* De la Tour, pages 113, 115:—

"The considerations on which the decision in Hochster *vs.* De la Tour, 2 E. & B., 678, is founded are that the announcement of the contracting party of his intention not to fulfill the contract amounts to a breach, and that it is for the common benefit of both parties that the contract shall be taken to be broken as to all its incidents, including non-performance at the appointed time; as by an action being brought at once, and the damages consequent on non-performance being assessed at the earliest moment, many of the injurious effects of such non-performance may possibly be averted or mitigated.

"It is true, as is pointed out by the Lord Chief Baron in his judgment in this case, that there can be no actual breach of a contract by reason of non-performance so long as the time for performance has not yet arrived. But, on the other hand, there is—and the decision in Hochster *vs.* De la Tour proceeds on that assumption—a breach of the contract when the promisor repudiates it and declares he will no longer be bound by it. The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the meantime, he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may be dealt with by him in various ways for his benefit and advantage. Of all such advantage the repudiation of the contract by the other party and the announcement that it never will be fulfilled must of course deprive him. It is therefore quite right to hold that such an announcement amounts to a violation of the contract *in omnibus*, and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract, and bring his action accordingly.

"The contract having been thus broken by the promisor and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach, by reason of the future non-performance, becomes virtually involved in the action as one of the consequences of the repudiation of the contract; and the eventual non-performance may therefore, by anticipation, be treated as a cause of action, and damages be assessed and recovered in respect of it, though the time for performance may yet be remote.

"It is obvious that such a course must lead to the convenience of both parties; and though we should be unwilling to found our opinion on grounds of convenience alone, yet the latter tend strongly to support the view that such an action ought to be admitted and upheld. By acting on such a notice of the intention of the promisor and taking timely measures, the promisee may in many cases avert, or, at all events, materially lessen, the injurious effects which would otherwise flow from the non-fulfillment of the contract; and in assessing the damages for breach of performance, a jury will of course take into account whatever the plaintiff has done, or has had the means of doing, and as a prudent man ought in reason to have done, whereby his loss has been, or would have been, diminished."

He further points out that a promise to marry creates a *status* or condition of betrothment, and this view is enforced by Mr. Justice Byles, in his concurring opinion, who contended that the breaking off of a mutual engagement to marry amounted to a breach of contract by putting an end to the condition of betrothment, which, according to the contract, was to continue.

These cases might very well, therefore, be sustained upon their particular facts as exceptions to the general rule; but the assertion by the Chief Justice that "a party to the contract has the right to have it kept open as a subsisting and effective contract," is unsustained by authority and entirely inconsistent with principle. Even in these cases the measure of damage is still said to be the compensation for the refusal to perform at the time fixed by the contract, and no one has ever suggested that the measure of damages for an anticipatory breach differed, except in so far as in one case the jury would be obliged to guess, whereas in the case of an actual breach they would be able to base their verdict upon facts instead of conjecture. The illustration of Mr. Justice Wells, in his opinion in Daniels *vs.* Newton, 114 Mass., 530, 532, of the case of commercial paper, is unanswerable. No renunciation of his obligation to meet his note would render the maker liable before the day fixed for payment, and, upon principle, it is impossible to distinguish between a promise to pay negotiable paper and the promise to pay for goods when and as delivered. The opinion of Mr. Justice Wells contains a thorough discussion of all of the authorities down to date, and he concludes by saying:—

"Much argument is expended in both cases upon the ground of convenience and mutual advantage to the parties from the rule sought to be established. But before that argument can properly have weight, the point to be reached must first be shown to be consistent with logical deductions from the strictly legal aspects of the case. The legal remedy must be founded on some present legal right, and must conform to the nature of that right. Until the plaintiff has either suffered loss or wrong in respect of that which has already vested in him in right, or has been deprived of or prevented from acquiring that which he is entitled to have or demand, he has no ground on which to seek a remedy by way of reparation. The conduct of the defendant is no wrong to the plaintiff until it actually invades some right of his. Actual injury, and not anticipated injury, is the ground of legal recovery. The plaintiff's rights are invaded by repudiation of the contract only when it produces the effect of non-performance, or prevents him from entering upon or completing performance on his part, at a time when and in the manner in which he is entitled to perform it or to have it performed."

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"That this is the natural and ordinary rule seems to be recognized by Lord Campbell when he declares that 'it cannot be laid down as a universal rule,' and proceeds to point out exceptions. And Lord Chief Justice Cockburn concedes it to be true 'that there can be no actual breach of a contract by reason of non-performance so long as the time for performance has not yet arrived.' L. R., 7 Ex., 114. But a preceding 'inchoate right' is discovered, and a corresponding obligation implied, upon which there may be held to be a 'breach of the contract when the promisor repudiates it and declares he will no longer be bound by it.'"

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"These, however, are considerations which touch the interpretation and effect of the particular kind of contract; and, so far as they tend to sustain the decisions upon the ground of implied obligations arising and requiring observance at once upon entering into the relation by means of such a contract, they also tend to remove the decisions themselves out of the range of the question we are now discussing. If there be sound reason to deduce from a promise to marry, or to employ in a special capacity, at a future time, present obligations of implied contract, upon which an action may be founded, in which the breach of the entire agreement, 'by reason of the future non-performance,' will be 'virtually involved,' 'as one of the consequences of the repudiation of the contract,' it surely is not sound reasoning by means of that process to arrive at the conclusion that all contracts having a future day for their performance include like rights and obligations, so as to enable one party to sue at once, as for a breach, whenever the other announces beforehand his purpose of future non-fulfillment. If this is the result, as it appears to be, of the English decisions referred to, or of the reasoning in those cases, we cannot accede to it. We have no occasion now to determine what may be the rule, where the contract may fairly be interpreted as establishing between the parties a present relation of mutual obligations, because we are of opinion that no such implied obligations can be engrafted upon the contract in the present case. It simply binds the defendants to receive a deed of real estate and pay or secure the purchase money; and its written provisions, by which alone their obligations are to be ascertained, allow them thirty days, at least, within which to fulfill their agreement. The plaintiff could require nothing of them until the expiration of that time; and no conduct on their part or declaration, whether of promise or denial, could give him any cause of action in respect of that agreement of sale. This action, therefore, cannot be maintained."

Daniels *vs.* Newton, 114 Mass., 530-539.

In other cases, both in England and in this country, the judges have contented themselves with treating the

two leading English cases as binding authorities, and there has been no serious consideration of the question upon principle and no critical discussion of the authorities. Extracts from the opinions are given in the foot note of all which go beyond the mere citation of the two leading English cases.*

The learned Circuit Judge says that in his opinion the argument in Daniels *vs.* Newton is well and sufficiently answered by Judge Lowell in Dingley *vs.* Oler, 11 Fed. Rep., 372, but upon a careful examination of the opinion of Judge Lowell it will not be found to merit this high

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* In Holloway *vs.* Griffith, 32 Iowa, 409—an action for an anticipatory breach of contract to marry—the court adhered to its earlier decision in 19 Iowa, 179, saying: "The rule we deem sound and just, and too well settled to be now called in question."

In Grau *vs.* McVicker, 8 Bissell, 13, 16, which was an action upon a contract of lease, Drummond, J., says:—

"The second objection, as already suggested, that inasmuch as this suit was commenced on the 13th of January, 1874, there was no complete liability on the part of Grau at that time by which McVicker could hold him responsible under the lease, conceding that he had given notice to McVicker before, that he could not comply with its terms, as it was not to begin until the 9th of February, and there was an opportunity for him to retract, or, as it is called in the books, a *locus pœnitentiæ*. Some authorities declare that in law there is this *locus pœnitentiæ*, and that a party shall have a chance to recant, and say, 'I was wrong, but when the time comes I will perform my contract.' Undoubtedly, there are authorities which declare that there cannot be a breach of contract, strictly so-called, until the time has arrived when its performance was to commence; and so in this case, there could be no breach of this contract until after the 9th of February, 1874, because that was the date of the commencement of the contract. There are other authorities, however, which hold the contrary; and in the conflict of authority upon the subject, the question is, what is the true rule in cases of this kind? And the chief importance, perhaps, of this case is that it becomes necessary to determine in the midst of the conflict of authority upon this subject whether, in point of fact, there could be a breach of this contract, properly so-called, so as to entitle McVicker to commence an action against Grau prior to the 9th of February, 1874, and I have come to the conclusion that there may be such breach.

"I think that the principles decided in the case of *Hochster* vs. *De la Tour*, reported in the 20th English Law and Equity Reports, 57, are sound. * * * The unanimous opinion of the court was that the

commendation. Alluding to the suggested case of the negotiable note, he admits that it would be difficult to apply the rule or to find any damages in a case of the extreme simplicity and singleness of that supposed, but he offers really no argument in support of his decision.

The illustration drawn from the case of negotiable paper is, however, a conclusive answer in all cases of ordinary commercial contracts. Take an executory contract to sell, where the buyer gives his notes in advance, payable, successively, at the dates of deliveries. Would it be contended that suit can be brought either on the notes or on the con-

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action was maintainable, and on the ground that although the time had not arrived when the contract was to commence, still, as the defendant had apprised the plaintiff that he would not perform it, the plaintiff was not bound to wait until the 1st of June or until the termination of the contract, it being for three months, before he brought the action. He could treat the breach as complete and recover against the defendant on the ground that there was a legal liability on the part of the defendant to respond in damages. And the reasoning in that case, it seems to me, is very strong. It reviews the arguments upon the subject. For example, there would be just as much reason to say that the action could not be maintained until the 1st of September as that the action could not be maintained for a breach prior to the 1st of June, because there were three months during which the service was to be performed, and in one sense it could not be said that there was a complete non-fulfillment of the contract until the three months had expired. And when in that case, and in this, the party who had become bound notified the other that he would not comply with his contract, he certainly ought not to complain if the other takes him at his word, for it may make a great difference to him as to what he shall do—as to other contracts he may make—whether or not that contract is binding on him. There are frequent cases where contracts run for years, and it would be unreasonable in such a case to require a party to wait all the time before he could institute an action against the delinquent person for damages. It seems to me that it is the better rule to hold that the party who has refused to perform his contract is liable at once to an action, and that whatever arises afterward or may arise in consequence of the time not having come or not having expired, should be considered in estimating the damages. For instance, if, in consequence of the discharge of a servant, or of the refusal of a person to require or receive any of the service which would take time, the servant has the opportunity of engaging in other employment, that can be shown in mitigation of damages, and one of the objections that occurred to me at the argument, I think, may not

tract immediately upon a renunciation in advance of the obligation to take the goods and pay the notes? But if not, it is impossible to distinguish such a case on the one hand from the giving of a promissory note, without more, or from an agreement to pay the price, without more, as usually expressed in an ordinary contract of sale.

When the promise is nothing but a promise to pay money, it is plain to every lawyer that the announcement of an intention not to perform that promise can give no new rights to the promisee, because he has nothing to do but to receive payment—and Judge Lowell apparently

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have the weight that I then supposed, namely, that the *status* of the parties in relation to the extent of their liability must be considered as fixed when the suit was commenced. That is not so. On the contrary, it is competent to show any facts which have occurred subsequent to the commencement of the suit for the purpose of determining the amount of damages which the party can recover; or, to apply it to this case, the amount of damages which the defendant could set off or recoup."

In Burtis *vs.* Thompson, 42 N. Y., 246, 250, Grover, J., said:—

"Any conduct by a party who has promised to marry another that will render the contract no longer obligatory upon that other, is a violation of the duty and obligation created by the contract, and may therefore be treated by the injured party as constituting a breach. Clearly, notifying the other party of a settled determination not to perform the contract is such an act. Annoying and distressing the feelings of the plaintiff in this way, whether the defendant was in earnest or not, fully justified the plaintiff in treating the contract as broken by the defendant. The plaintiff's (defendant's ?) counsel insists that if this is the law to be applied in the present case, it will follow that the maker of a note due at a future day will make himself liable to an action instantly by declaring to the holder that he will never pay it. This conclusion does not at all follow. *In the case of such a note, the holder is in no respect damnified until payment is withheld after it is due. Until this happens, no legal right of his has been violated by the maker.* Not so in the present case. The defendant in a legal sense had rendered it certain that the plaintiff had lost absolutely all benefit to be derived by her from the contract. He had wrongfully caused her all the distress of wounded feelings that a breach by him at the day would inflict, which is an essential consideration in estimating her damages. In Hochster *vs.* De la Tour (20 Eng. L. & Eq.), it was held that a party who had contracted with another to enter his service as a carrier (*sic*) on the first day of June thereafter,

concedes this—but it is entirely sufficient for the protection of the party receiving such a notice in every other case, to relieve him from the duty of performance on his part without creating a new contract by accelerating the day of performance and payment. What consideration does he give for the creation of new rights and the imposition of new liabilities, and upon what principle is it that it is left optional with him to retain the old contract or make a new one at his pleasure? The rule heretofore was that upon notice of repudiation he might rescind, in which case the mutual promise was a consideration, or at his election

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became liable to an action before that day by giving notice of his refusal to employ him according to the contract. While not fully prepared to concur in the judgment in this case without further consideration, yet the reasoning of the learned judge, when applied to the facts in the present case, clearly shows the correctness of the charge upon the point under consideration."

In Howard *vs.* Daly, 61 N. Y., 362, an action for breach of contract of service, Professor Dwight, acting as commissioner of appeal, reviews the English cases, and concludes that "the rule in Hochster *vs.* De la Tour is universal in its application to contracts to be performed at a future day," but adds, "I presume it would scarcely be extended to mere promises to pay money or other promises of that nature, where there are no mutual stipulations."

The question was incidentally involved in Mountjoy *vs.* Metzger, 12 Am. Law Reg., N. S., 442-446, where the reasoning of Hare, J., is against the right to maintain the action in the present case, although he expresses the opinion that the rule of Frost *vs.* Knight will prevail in the United States. He says:—

"*It is no doubt true in general that a suit will not lie on the day on which default is made in the performance of a pecuniary obligation. The cause of action is not complete on a promissory note until the morning after the last day of grace, and the principle is the same in the case of a bond. This is not because a man who is injured cannot seek redress immediately by suit, but because non-performance is not an injury until the time for fulfillment has expired.* If a man removes or converts the goods of another, the latter may proceed at once in trover or replevin; and so when a vendor refuses to deliver the goods, notwithstanding a tender of the price. In like manner a man who shoul I promise to pay a sum certain at noon on a given day, could not complain that a writ issued the next hour was premature. It follows that when a purchaser refuses absolutely to accept or pay, the vendor may proceed forthwith in debtor *assumpsit*."

he might enforce; but to allow him to recover damages for the breach of the contract in advance of the time of performance, is to give him more than compensation, and to impose more than damages upon his adversary.

It should be further pointed out that the rule relieves the seller from all risk and cost. If nothing had occurred leading the defendant to decline to take the hops, the plaintiffs would have been bound, even if they had made forward contracts, to run the risk of performance on the part of their vendors. Dealing in a commodity, of fluctuating value, there would have been constantly the risk in respect to solvency and the willingness to deliver. Assuming a contract running over many years, the obligation of a vendor in California or the Philippines would be of very uncertain value, and yet, according to the rule adopted by the learned judge, the seller may relieve himself from all risks of non-performance on the part of his vendors, without even going to the trouble of making a formal contract, and prove that he could have bought at the bottom of the market, and thereby establish a standard of value. This is to put the plaintiffs in a far better position than if the contract had been performed, and to reward them for having the contract broken; and this, too, in the face of the fact that they unquestionably would have the right, under the authorities, to refuse to acquiesce in the renunciation, and to hold the contract open until the time of performance.

It may also be observed that the adoption of the rule in cases like the present, gives to the plaintiff in actual practice much more than he is entitled to have. In fixing the contract price for forward deliveries, the vendor must always charge for the risks of the market, and the other risks of business, while the defendant had certain chances to the benefit of which he was lawfully entitled. The vendor ran the risk of not being able to buy the article he had contracted to deliver, or of loss in transportation, and of the ultimate solvency of the buyer, all of which risks entered into the price. All these chances are eliminated, and the defendant, instead of being called upon to pay the

damages fairly resulting from his refusal to take each successive delivery, is required to make a lump payment in advance, covering the aggregate estimated losses. This is giving the vendor more than compensation, and depriving the purchaser of the chances to which he is entitled, of being relieved from an onerous and oppressive bargain. In a proper case, notice of a refusal to accept may excuse failure to perform, as prevention is always an answer to the plea of the want of readiness to perform; but as the action for an anticipatory breach is avowedly intended to put the parties in the same condition as they would have been in upon a failure to perform at the maturity of the contract, there is no collateral reason, as in the case of a servant, or of the betrothed woman, to give this compensation before the aggrieved party is entitled to it by the terms of his contract.

SECOND.

OF THE MEASURE OF DAMAGES.

In discussing the measure of damages, Judge Kirkpatrick says:—

"In an action upon an ordinary contract for sale and present delivery, the damage is measured by the difference in price as fixed by the contract and the market value at the time of delivery; but that this is not a general, invariable rule is apparent from the fact that it cannot be made to serve as a measure of damages in a case like the one at bar, where there is need for an immediate ascertainment, though delivery, by the terms of the contract, was not to be made until after the rendition of the judgment. The rule was no doubt adopted because in cases where applicable, it furnished the best means by which compensation might be made to the party injured. Where, however, from the nature of the case, other means must be employed, the courts do not hesitate to adopt a different rule. Thus, in Huntley *vs.* the Pittsburg Bessemer Steel Company, 121 U. S., 264, where a contract was made for steel rails of a particular kind, which the plaintiffs were prevented from manufacturing and delivering by the misconduct of the defendant, the court held that 'the proper rule of damages was the difference between the cost per ton of making and delivery and the contract price.'

"The basis of recovery was said to be the gain which the plaintiff would have had if permitted to complete the contract. The damages

of the plaintiffs in this case should be assessed upon the same principle—that of the gain there was to him in the contract at the time. The best means of finding this gain was by learning the difference between the price for hops delivered according to the terms of the contract and the price at which responsible parties in the market were willing to assume similar liabilities. The objection on the part of the plaintiff (defendant) that he was entitled to the benefit of the market at each due date of delivery is not tenable, nor can any weight be attached to the suggestion that by this means the plaintiffs get the use of the money before the date called for by the contract. By his own acts he made necessary an antecedent ascertainment of the damages, and is bound to accept the situation caused by his own wrongdoing. Anvil Mining Co. *vs.* Humble, 153 U. S., 540.

"The record shows at what price such subcontracts as above referred to were obtainable, and judgment was rendered in accordance therewith."

It has always been recognized that in an action for an anticipatory breach of contract it is extremely difficult to arrive at the true measure of damages. In the case of the servant, the jury must guess as to his chances of obtaining employment. In fact, in Hochster *vs.* De la Tour he had secured a new engagement before trial. In the case of the betrothed woman they would be obliged to guess as to her chances of getting married in the interval, but that would be no more difficult than in the ordinary case of an actual breach, when the chances of future marriage should always be taken into account.

But in the ordinary action for failure to take and pay for goods the measure of damages is the difference between the contract and market price, of which the best evidence is a public sale, or a sale in the regular course of trade at the full market rate, after notice. In such a case the goods must be shown to be of the quality contracted for, and the price obtained upon resale is, of course, a fair test of market value. The difference between what the plaintiff gets from the resale and the contract price is exactly and precisely the compensation to which he is entitled. The verdict puts him exactly where he would have been if the purchaser had taken and paid for the goods.

In Brown *vs.* Muller, L. R., 7 Ex., 319, the plaintiff bought iron, to be delivered in about equal proportions

in September, October, and November. In August the defendant gave notice that he did not intend to deliver. In December the plaintiff began his action for non-delivery, and it was held that the proper measure of damage was the difference between the contract and market prices of one-third of five hundred tons on the 30th of September, the 31st of October, and the 30th of November respectively.

Chief Baron Kelly said:—

"It has been argued with much ingenuity that the damages ought to be estimated at a lower figure if it appear that when the defendant announced his intention of not delivering, or, at all events, when the first breach took place and it became apparent that the contract could never be performed at all, the plaintiff might have entered into a new contract to the same effect as the old one for the months of October and November on as favorable terms; and if the plaintiff, on hearing he would never get delivery, was bound to go and obtain, if he could, the new contract suggested, then, no doubt, assuming that he might have made such a contract, the damages ought to be limited to his loss at that time. But there was, in my opinion, no such obligation. He is not bound to enter into such a contract, which might be either to his advantage or detriment, according as the market might fall or rise. If it fell, the defendants might fairly say that the plaintiff had no right to enter into a speculative contract, and insist that he was not called upon to pay a greater difference than would have existed had the plaintiff held his hand. Or, again, by such a course, the plaintiff might be seriously injured and yet have no remedy. Suppose, for example, his new contract was with a person who proved insolvent. He would, in that case, be without redress; he would have lost his former contract, and his new one would turn out worthless. In either event, therefore, I do not think the plaintiff could be called upon to enter into a fresh contract. If he did, and thus obtained an advantage, he no doubt might save the defendant from some damages. But if he should suffer a loss, as by the insolvency of the new contractor, he could not make the defendant answer for it. And if it should happen that he might have done better for the defendant by waiting and making no speculative contract, the defendant would in his turn have a fair right to complain that his loss had not been mitigated as far as possible."

Brown *vs.* Muller, L. R., 7 Ex., 319-322.

In Roper *vs.* Johnson, also (L. R., 8 C. P., 167), it was contended by the counsel for the defendant that the plaintiff should have gone into the market immediately upon

the breach and obtained a similar contract. It will be observed that the action was by the buyer for refusal to deliver. In the course of the opinion of the court it is intimated that the defendant might have given evidence that another contract might have been obtained on better terms on the day of the notice of the refusal to accept, but that in the absence of such evidence the true measure of damage was the market price upon the day appointed for performance. The remarks of Mr. Justice Brett are so directly in point that they may be quoted at length:—

"This is an action brought upon a contract for the purchase and sale of marketable goods, whereby the defendant undertook to deliver them in certain quantities at certain specified times, and the action is brought for the non-performance of that contract. Now, in ordinary cases, the contract is to deliver the goods on a specified day, and there is no breach until that day has passed. In the case of marketable goods the rule as to damages for breach of the contract to deliver is the difference between the contract price and the market price on the day of breach. That is perfectly right when the day for performance and the day of breach are the same. Another form of contract is, as in Brown *vs.* Muller, Law Rep., 7 Ex., 319, to deliver goods in certain quantities on different days. The effect of the judgment in that case is that the contract being wholly unperformed, there is a breach—a partial breach—on each of the specified days; such breaches occurring on the same days as the days appointed for the performance of the several portions of the contract. But the case of Hochster *vs.* De la Tour, 2 E. & B., 678, 22 L. J. (Q. B.), 455, introduced this qualification, that where one party, before the day for the performance of the contract has arrived, declares that he will not perform it, the other may treat that as a breach. That complication has arisen here, the contract being for the delivery of the goods on future specified days, the defendant has, before the time appointed for the last delivery, declared that he will not perform the contract, and the plaintiffs have elected to treat that as a breach and to bring their action.

"Now, to entitle a plaintiff to recover damages in an action upon a contract, he must show a breach and that he has sustained damage by reason of that breach. These are two quite distinct. All that Hochster *vs.* De la Tour, 2 E. & B., 678; 22 L. J. (Q. B.), 455, decided was this, that if before the day stipulated for performance, the defendant declares that he will not perform it, the plaintiff may treat that declaration as a breach of the contract and sue for it. Now comes the question whether in such a case as this there is to be a different rule as to proof of the amount of damage which the plaintiff has suffered. The general rule as to damages for the breach of a contract is, that the plaintiff is to be compensated for the difference of his position

from what it would have been if the contract had been performed. In the ordinary case of a contract to deliver marketable goods on a given day, the measure of damages would be the difference between the contract price and the market price on that day. Now, although the plaintiff may treat the refusal of the defendant to accept or to deliver the goods before the day for performance as a breach, it by no means follows that the damages are to be the difference between the contract price and the market price on the day of breach. It appears to me that what is laid down by Cockburn, C. J., in Frost *vs.* Knight, in the Exchequer Chamber Law Rep., 7 Ex., 111, involves the very distinction which I am trying to lay down, viz., that the election to take advantage of the repudiation of the contract goes only to the question of breach, and not to the question of damages: *and that when you come to estimate the damages, it must be by the difference between the contract price and the market price at the day or days appointed for performance, and not at the time of breach.* Now, how does the Chief Justice deal with the matter? He deals first with the case of an action brought after the day for performance. He says: 'The promisee, if he pleases, may treat the notice of intention as inoperative and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but, in that case, he keeps the contract alive for the benefit of the other party as well as his own. He remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it.' He then treats of the other case: 'On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time,' that is, from non-performance of the contract at the time or times appointed for its performance. That clearly negatives Mr. Herschell's argument, and gives the rule for the assessment of damages in the way I have stated, viz., *that they must be such as the plaintiffs would have sustained at the day appointed for performance of the contract.* Then he goes on and shews the real distinction between the cases he has put, 'Subject, however, to abatement in respect to any circumstances which may have afforded him the means of mitigating his loss.' He says further: 'The contract having been thus broken by the promisor, and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach by reason of the future non-performance becomes virtually involved in the action as one of the consequences of the repudiation of the contract; and the eventual non-performance may therefore, by anticipation, be treated as a cause

of action, and damages be assessed and recovered in respect of it, though the time for performance may yet be remote. It is obvious that such a course must lead to the convenience of both parties; and though we should be unwilling to found our opinion on grounds of convenience alone, yet the latter tend strongly to support the view that such an action ought to be admitted and upheld. By acting on such a notice of the intention of the promisor, and taking timely measures, the promisee may in many cases avert, or at all events materially lessen, the injurious effects which would otherwise flow from the non-fulfillment of the contract: and, in assessing the damages for breach of performance, a jury will, of course, take into account whatever the plaintiff has done, or has had the means of doing, and as a prudent man ought in reason to have done whereby his loss has been or would have been diminished.' He uses the very term I used in the course of the argument, and which Mr. Herschell objected to, viz., 'ought to have done.' It seems to me to follow from that ruling that the plaintiffs here did all they were bound to do when they proved what was the difference between the contract price and the market price at the several days specified for the performance of the contract, and that *prima facie* that is the proper measure of damages: leaving it to the defendant to shew circumstances which would entitle him to a mitigation. No such circumstances appeared here; there was nothing to shew that the plaintiffs ought to have or could have gone into the market, a rising market, and obtained a similar contract. But I cannot help thinking that the Chief Justice's judgment in the case last referred to goes further, and says in effect that the plaintiffs were not bound to attempt to get a new contract. It was upon precisely the same argument that the Chief Baron in Brown *vs.* Muller, Law Rep., 7 Ex., 319, decided against Mr. Herschell that the plaintiff there, as a reasonable man, was not bound to make a forward contract. Baron Martin held the same, though apparently with some reluctance; but no doubt is expressed in the judgment of Baron Channell. If we had been altogether without authority I should have come to the same conclusion. But I think we are bound by the authority of Frost *vs.* Knight, Law Rep., 7 Ex., 111, and Brown *vs.* Muller, Law Rep., 7 Ex., 319."

As already noted, the action in Roper *vs.* Johnson was by the buyer for refusal of the seller to deliver the coal he had agreed to furnish. What is said as to the possibility of the defendant mitigating the damages by offering evidence to prove that the plaintiff could have provided himself with other forward contracts is purely *obiter*, but rests on the familiar rule that the party aggrieved must reduce the damages so far as possible. The plaintiffs claimed that they needed the coal for consumption, and

it was argued that it was their duty to supply themselves by taking contracts at lower prices, if able to do so, but it is difficult to see why they had not the right to take the risk of the market and to defer supplying themselves from month to month until the coal was actually needed. What was actually decided was, that if evidence could have been produced to prove that forward contracts could have been obtained, the burden rested upon the defendant to prove the fact, but it was not decided that if such evidence had been tendered it would have been competent, and in the opinion of Kelly, C. B., it would not have been.*

But the case of the buyer who needs goods for use and neglects to provide himself elsewhere, and to mitigate the damages, when the chance offers, is very different from the present, where the seller claims that he could have bought forward contracts in advance, and could have thus qualified himself to make the deliveries as they would have become due. This is for the purpose of aggravating, not of mitigating, the damages. According to the contract, the extent of the buyer's obligation was to take the goods as delivered, at the times and in the amounts stipulated, or to pay the difference between the contract price and what the seller could get for them from some one else upon a resale at the full market price. He is entitled to the benefit of the market at each due date, and *non constat* that the market might not advance so as to make the loss nominal. In fact, the price allowed for the crop of 1897 was two cents higher than for that of 1896, and the evidence showed that the lowest prices ruled in the Summer of 1896, after which time there had been a steady advance.

In his opinion the learned judge of the Court of Appeals does not meet, or even discuss, the objection that the plaintiffs were given their money before the date called for by the contract. It does not matter whether the defendant is a wrongdoer or not. The only damages which

* In the case of L. S. & M. S. Ry. Co. *vs.* Richards, 152 Ills., 59, however, the question came up for decision, and it was *held* that the vendor, not being bound to accept the notice of renunciation, was not required to resell the grain on hand or make a forward contract, but might treat the contract as still in force.

the plaintiffs could recover for the breach of their contract would be an amount sufficient to give them compensation, or, in other words, to put them in precisely the same position which they would have been in if the contract had been performed.

If the contract had been performed, they would not have received the purchase money until the time of payment according to the contract, and the final payment could not have been had until the tenth day of August, 1898. It is obvious, therefore, that assuming that the computation of damages was correct in all other respects, the plaintiffs were only entitled to insist on the payments which should have been made down to the date of judgment, and the defendant was entitled to a discount on all future payments down to August 10th, 1898, for the simple reason that the plaintiffs were not entitled to get their profits until the time of actual delivery. The contract price was twenty-two cents per pound, and the average damages allowed were twelve cents per pound, or twelve twenty-seconds or six-elevenths of the contract price, so that the plaintiffs were awarded six-elevenths of the contract price as of October 24th, 1896, though the last installment was not due under the contract till August 10th, 1898. It is very apparent, also, that as at the time of the refusal to accept the first tender in October, 1896, the market was at the lowest point, and prices continued to advance down to August, 1898, the plaintiffs have been allowed to recover and the defendant compelled to pay a sum far beyond what would have compensated the plaintiffs for the actual breaches of the different contracts as they matured, and if, in addition, the defendant is required to make this payment months before the money was due according to the contract, the dangers and mischiefs of judge-made law will be manifest.

It may be incidentally remarked that the court was plainly in error in holding that the four contracts written upon four separate papers, calling for payment as each delivery was made, constituted an entire contract. They are, in fact, the very type of the divisible contract, each in itself independent, calling for the delivery of a separate

installment, and the payment for the parcel when and as delivered. The plaintiffs had no right, therefore, to include all in one suit, when only one had been broken at the time the writ issued. A renunciation of one contract cannot constitute an anticipatory breach of subsequent and independent contracts.

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